SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1964

No. 937

In the Matter of

ARTHUR BENNETT, an Attorney,

Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LEONARD FELDMAN,
Attorney for Petitioner,
350 Fifth Avenue,
New York, New York.

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TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner above-described, respectfully prays that a writ of certiorari issue in the above captioned case directed to the Court of Appeals of the State of New York to review its order of affirmance dated and entered December 3, 1964. (See certified record submitted herewith.)

Opinions Below

The only opinion issued in this proceeding was that of the Supreme Court of the State of New York, Appellate Division, First Department, on September 24, 1963, 20 A.D. 2d 218, 246 N.Y.S. 2d, 303.

Jurisdiction

The order of the Court of Appeals sought to be reviewed was dated and entered December 3, 1964. Therefore, the time within which this petition for writ of certiorari might be secured will expire on March 3, 1965.

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257.

Proceedings Below

By petition verified December 15, 1960, the respondent Co-ordinating Committee on Discipline brought a disciplinary proceeding against the petitioner herein. Thereafter and pursuant to an order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 13, 1961, a Referee was appointed to take testimony and report. Hearings were held and on June 25, 1963, the Referee reported to the Appellate Division sustaining certain of the charges and recommending dismissal of others.

Thereafter, the respondent herein moved to confirm the Referee's report in certain respects and to disaffirm it in other respects. Petitioner herein cross-moved for similar relief and squarely presented the constitutional questions here involved. By order dated January 30, 1964, the Appellate Division, First Department, disbarred the petitioner.

Thereafter, the parties herein moved for leave to reargue, or in the alternative, for leave to appeal to the Court of Appeals from the said order of disbarment. By order dated March 24, 1964, the Appellate Division denied both the motion for reargument, or in the alternative, for leave to appeal to the Court of Appeals.

Thereafter, the petitioner herein appealed as of right to the Court of Appeals on the constitutional issue of due process. The respondents herein moved in the Court of Appeals to dismiss the appeal on the ground that no substantial constitutional question was involved in the petitioner's appeal. The respondents' motion to dismiss the appeal was denied by the Court of Appeals by its order dated December 3, 1964.

The Court of Appeals heard the petitioner's appeal on the constitutional issue and affirmed the order of the Appellate Division below, without opinion.

Questions Presented

1. Did the suppression of evidence by the respondents, which evidence was favorable to the petitioner, violate due process where such evidence was material to the guilt of the petitioner or the discipline to be meted out to him?

2. The Court of Appeals of New York having ruled that a disciplinary proceeding against an attorney is covered by the statutes and rules of procedure pertaining to civil proceedings, is the suppression of evidence by a prosecutor in such a disciplinary proceeding a denial of due process under the Fourteenth Amendment of the Constitution of the United States?

Constitutional Provisions Involved

The provision of the Constitution of the United States involved herein is the Fourteenth Amendment, the pertinent section of which is as follows:

> "Section 1 * * * nor shall any state deprive any person of life, liberty or property, without due process of law; or deny to any person within the jurisdiction the equal protection of the law."

Statement

Of the charges against the petitioner submitted to the Referee, the Referee held that the charges had been sustained as follows:

Charge 1—In the prosecution of personal injury claims knowingly submitting false loss of time and earning claims to an insurance carrier (2 instances).

Charge 2—Conspiring to submit false personal injury claims to an insurance carrier (1 instance).

Charge 6—Settling claims of infants without procuring court orders approving such compromises and fixing legal fees (2 instances).

Charge 8—Using the name of another attorney, with his permission, to prosecute an action or claim.

Charge 9—Failure to preserve complete files pursuant to Rule IV-F of the Special Rules of the Appellate Division, First Department of the Supreme Court of the State of New York (now Rule 4(6)).

On the motion to confirm the Referee's report, the Appellate Division confirmed the report in all respects except that it added an additional specification as being sustained in Charge 1 (the Referee had found that such specification had not been sustained), and also reversed the Referee and found that Charge 4 had been established by respondents. Charge 4 accused petitioner of payments to one, Benjamin, an insurance carrier employee, to corruptly influence settlements.[1] The only evidence to sup-

1. The First Department on an identical charge, involving the same employee's identical accusation against another attorney and on stronger evidence, confirmed a referee's report which found Benjamin completely unworthy of belief (as did the Referee here). Matter of Greenberg (1963), 19 A.D. 2d 375.

port this charge was the uncorroborated testimony of Benjamin appearing as a witness for respondents. On this charge, evidence had also been suppressed by respondents.

The Appellate Division took cognizance of the "due process" issue and wrote as follows:

> "We have examined the record in the light of the contention that the requirements of due process were not met. This is largely founded on the allegation that testimony was adduced by promises of leniency made by the Assistant District Attorney who presented the matters involved to a New York County Grand Jury and who was trial counsel for petitioner in this proceeding. It is also asserted that false testimony was adduced in this proceeding to the knowledge of petitioner's trial counsel. A careful examination of the record establishes no factual basis for these contentions. The record demonstrates that the matter was fully, fairly and scrupulously presented."

Although the Appellate Division referred to the suppression of evidence as a mere "allegation" of such suppression, as will be seen in a later section of this brief, it cannot be disputed that the record discloses more than a mere "allegation". Uncontroverted proof of suppression was presented.

The issue of due process is directly involved in Charges 1, 2 and 4, for it was in connection with these charges that evidence was suppressed. The effect of such suppression permeated the other charges as well. There can be no doubt that the seriousness of Charges 1, 2 and 4 was of overwhelming influence in determining the decision of the Appellate Division to disbar the appellant.

It need not be argued that the responsibility of a prosecution is as great in a disciplinary case as in a criminal case. In a disciplinary proceeding the prosecution not only has the burden of producing all evidence unfavorable to a respondent, it also has the burden of producing all the evidence that is favorable to a respondent.

In briefest summary, the facts relating to the suppression of evidence follow.

Charge 2—The "Kaston" Conspiracy

Alvin Kaston, a client of petitioner, and three of Kaston's employees conspired together to present false and fraudulent personal injury claims to an insurance carrier. After the scheme was hatched and through Kaston, petitioner was retained to represent the employees. The only witness who accused petitioner of knowingly participating in the scheme was Kaston himself, and even he was not too positive. Kaston's employees, however, effectively exonerated the petitioner of any knowledgeable participation in the conspiracy (1152-1153, 1823-1824).[2] The evidence of petitioner's innocence of any knowledge of the falsity of the claims was substantial (677-679, 454, 459-461, 1633, 1141-1142, 1556, 1152-1153, 1823-1824). Kaston even arranged for his own personal physician to support the false claims of injury by his employees—a physician unknown to petitioner and with whom petitioner had absolutely no dealings (617, 2267).

When the fraud was uncovered, the employees exonerated the petitioner of complicity in the conspiracy to the insurance carrier's investigators (Exs. 9-E, 9-F, 15-C, 15-D). That exoneration carried through to the investiga-

2. Parenthetic references are to the transcript of testimony, unless otherwise noted.

tion into the fraud being conducted by Mr. Harris, a then assistant District Attorney in New York County.[3]

Alvin Kaston was indicted for grand larceny. Thereafter he pleaded guilty to a petit larceny charge, made full restitution and received a suspended sentence (954, 2731-2748, 2772-2777).

At the hearings before the Referee Kaston denied any knowledge of how it came about that he was allowed to plead guilty to petit larceny, a misdemeanor, after being indicted on four felony counts.

> "Q. Are you aware of the fact that you were indicted for grand larceny and that you were permitted to plead—were you aware of the fact that you were indicted for grand larceny and permitted to plead to petit larceny? A. Yes, sir.
>
> "Q. *How did that come about, do you know?* A. *No, sir*" (954, emphasis supplied).

Mr. Harris sat silent and said nothing.

Eight months later, long after the disciplinary hearings were concluded, Mr. Harris admitted under oath that he, as an assistant District Attorney, had made a "deal" with Kaston, which took several conferences to arrange, to recommend to the court acceptance of a petit larceny plea on condition that Kaston involve the petitioner in the conspiracy to defraud the insurance carrier (2724-2726, 2731-2743, 2746-2747).

Charge 1—Irving Blum

When Irving Blum, a client of petitioner, was first interrogated by respondents *in camera* and under oath, he exculpated the petitioner of any involvement in the

3. It was this same Mr. Harris who was respondent's trial counsel in the prosecution of the respondent's charges against petitioner.

charge. At the disciplinary hearings before the Referee, however, Mr. Blum and his wife directly inculpated the petitioner.

Eight months after the hearings were closed, Mr. Harris admitted, under oath, that Blum had changed his story in the course of a pre-trial preparation session with Mr. Harris. He also admitted that Blum and his wife asked him not to call Blum's mother as a witness (2779-2783, 2802, 2805, 2790-2791). Although a case involving Blum's mother was also the subject of a charge against petitioner, after Blum, corroborated by his wife, had seriously involved the petitioner, the charge involving Blum's mother was dropped and Blum's mother was never called as a witness.

It is reasonable to conclude that Blum changed his testimony in order to prevent his mother being called as a witness.

When Mr. Harris, on the stand, was asked whether he paid any attention to the fact that Blum was going to testify to facts materially and substantially contrary to Blum's prior testimony under oath, Mr. Harris blandly stated that he paid no attention to such inconsistencies, commenting that the task of resolution of such inconsistencies was the task of the Referee (2782).

Charge 1—Alvin Denbaum

Although this specification was not sustained by the Referee or the court, it corroborates the pattern of suppression here involved.

In this case, Mr. Denbaum's *in camera* testimony before the Co-Ordinating Committee on the occasion of his first appearance, and under oath, did not implicate the petitioner in any professional misconduct (302-305). There-

after, he was called before an assistant District Attorney and, after appearing at the District Attorney's office (253), he appeared *in camera* again before the Co-Ordinating Committee and involved the petitioner in the use of an allegedly false letter of employment to support a claim of damage being made by Denbaum in a personal injury case (351-353). Between his first and second appearances before the Co-Ordinating Committee, Mr. Denbaum had been told by no less than an assistant District Attorney that his testimony before the Co-Ordinating Committee had been false (281); had been advised by that same personage that "they" (otherwise unidentified) were interested in getting the petitioner and not Mr. Denbaum (283); and, *that if he would go along and work with "them", "they" would do nothing about his having defrauded the insurance company* (282).

It was following the foregoing goad to his self-interest that Mr. Denbaum for the first time told anyone that the letter of employment (Ex. 5A-1) was false; *permitted himself to be fitted with a recording device* (292); *was supplied with a number of questions to ask the petitioner (in the hope, one supposes, that the petitioner would utter some self-incriminating statements)* (278-279); and, after failing to induce the petitioner to say anything of an incriminating nature, appeared before the Co-Ordinating Committee to tell them that the petitioner knew that the employment letter was false (351-353).

As in the Benjamin and Kaston matters, here again we have a repeat of the pattern of the obtention of an inculpatory statement from a witness through the use of the device of promising a witness freedom from or leniency in prosecution in return for an accusation against petitioner.

As in the Kaston, Blum and Benjamin cases, Mr. Harris did not reveal that Denbaum had not made his accusation until he received a promise of immunity or other consideration for doing so. Those facts came out on cross-examination. That the circumstances which induced Denbaum's testimony were adduced on cross-examination was providential. Had Denbaum chosen to lie and to deny the inducement the charge against petitioner would, in all probability, have been sustained.

Charge 4—Stanley Benjamin

Stanley N. Benjamin was an insurance company adjustor. Respondents charged that the petitioner paid Benjamin 5% of the gross settlement amounts of a number of cases that petitioner settled with Benjamin's company. With regard to the evidence to support such charge, the only evidence produced by respondents was that of Benjamin himself. Manifestly, the credibility of Benjamin as a witness was vital to respondents' case.

Although the Referee found that respondents had not sustained the charge, the issue of suppression also permeated the Benjamin issue. (The Appellate Division set aside the Referee's holding and sustained the charge.)

Benjamin had testified to a transaction with Mr. Harris, then an assistant District Attorney, relating to the circumstances under which he first involved the petitioner. As in the Kaston case, Benjamin's pose was that of a former sinner now trodding the path of rectitude and honesty. Although Mr. Harris knew, as was later disclosed, that Benjamin was not telling the truth before the Referee (at least according to Mr. Harris), he sat silent and allowed Benjamin to so testify without disclosing the true nature of the transaction. It was 8 months

after the hearings were concluded that Mr. Harris first disclosed that Benjamin had been lying while on the stand.

As has been demonstrated, in instance after instance, evidence which went to the substance of the charges or the credibility of respondents' witnesses was not disclosed. How much other such evidence exists petitioner does not know.

When this issue of suppression of evidence was brought to the attention of the Referee,[4] respondents took the position that: "*No vital evidence was withheld* by petitioners." (See petitioners' supplemental brief before the Referee, page 1, *emphasis supplied.*)

Curiously, there is no mention of this entire issue in the Referee's report.

Reasons for Allowance of the Writ

The disbarment of an attorney accomplished by the suppression of evidence effects a fundamental denial of due process which affects not only the petitioner, but also the entire administration of justice.

The record below conclusively shows that evidence going both to guilt and to the degree of punishment was suppressed during the course of the hearings before the Referee. In suppressing such evidence, trial counsel for the respondents violated his obligation to ensure petitioner a full and fair trial.

This Court described the obligation in *Berger* v. *U. S.*, 295 U. S. 78, at page 88, as follows:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a

4. The issue of suppression of evidence and the resultant denial of due process were the subjects of the additional hearings of February 18, and February 21, 1963.

> sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should so do. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Is the obligation of counsel in a disciplinary proceeding any less than that of an assistant U. S. Attorney?

The reason for the requirement of full disclosure relates to the quality of evidence and is very pungently set forth in *People* v. *Savvides,* 1 N. Y. 2d 554, where the court unanimously made the following statement at pages 556 and 557:

> "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. * * *
>
> "It is of no consequence that the falsehood bore upon the witnesses' credibility rather than upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

The court continued at page 558:

> "Convincing though proof of guilt may be, and there can be no denial of its strength in this case, we could here affirm 'only if' were to announce

> a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt' (People *v.* Mleczko, supra, 298 N. Y. 153, 1963). We were not in Mleczko, and we are not now, prepared to announce such a doctrine."

There is no position to be taken that *People* v. *Savvides* was a criminal case and hence not applicable to a disciplinary proceeding. That case dealt with the quality of evidence. Does anyone by any stretch of imagination believe that false testimony is of better quality if given in a civil proceeding? Would anyone want to argue that such evidence is of better quality in a disciplinary proceeding?

Evidence of value to the petitioner's defense and known to respondents' trial counsel, was withheld from respondent. The law throughout the United States is clear. A denial of due process occurred.

This Court, in *Lisemba* v. *California*, 314 U. S. 219, 236, held that, "the failure to observe that fundamental fairness essential to the very concept of justice," is what constitutes a denial of due process. See also, *Adamson* v. *People of California*, 332 U. S. 46.

In the United States Circuit Court of Appeals for the Second Circuit where the issue was inconsistency between testimony and prior statements under oath before a grand jury, a unanimous court in *U. S.* v. *Zborowski* (CC2), 271 F.2d 661, reversed a conviction and held, at page 668:

> "The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the govern-

> ment disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuing a conviction."

The court went on, at page 668:

> "Our standards of fair play in criminal proceedings require that the government should present its evidence in its true colors and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness it places on the stand."

See also, *U. S.* v. *Spangelet,* 258 F.2d 338, 342.

In *U. S.* v. *Ragen,* 86 F. Supp. 382 (D.C. Ill.), the court stated, at page 387:

> "A prosecutor must, to be fair, not only use the evidence against the criminal, but must not unwillingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged."

See also, *Griffen* v. *U. S.,* 183 F. 2d 990, 993.

In *Brady* v. *State of Maryland* (1963), 373 U. S. 83, 83 S. Ct. 1194, it was stated, at page 104:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Following *Brady,* the Second Circuit in *U. S. ex rel. Meers* v. *Wilkins,* 326 F. 2d 135, held that the request for production is not the critical element and ruled that a

failure to produce evidence favorable to an accused, regardless of demand therefor, constitutes a denial of due process.

It is respectfully submitted that the issue of due process is real and compelling. The fact that most of the cases cited are criminal cases in no wise reduces their significance to this proceeding. They concern themselves with the conduct of trials and not with the quantum of proof.

The Significance of the Issue in Relation to Punishment

Although it is manifest that a trial which is fatally defective because a denial of due process has occurred, renders the entire trial a nullity, in the case at bar there is a further issue raised by what occurred.

If the Referee had found that Charges 1, 2 and 4 had not been sustained, but that Charges 6, 8 and 9 had been sustained, the Appellate Division would have faced a very real issue with regard to the measure of discipline to be meted out. This is especially true in the light of the mitigating circumstances noted by the Referee in his report. Thus, there was no finding by the Referee or the Appellate Division that the respondent was guilty of any corrupt, improper or venal motive in relation to Charges 6, 8 and 9. On the other hand, the nature of Charges 1, 2 and 4 are such as to render consideration of Charges 6, 8 and 9 academic. In the light of the respondents' record of public service and his unblemished professional record, the Appellate Division's view of the respondent, in all likelihood, would have been materially different if all it had before it were Charges 6, 8 and 9.

It is submitted, therefore, that the withholding of evidence necessarily affected not only the merits of the

conclusion below, but also the discipline to be imposed. It is in this manner that appellant has been prejudiced as well, for it is settled that a withholding of evidence that affects punishment is as much a denial of due process as a withholding of evidence that affects the guilt or innocence of the accused.

> *Brady* v. *State of Maryland,* 373 U. S. 83, 104, 83 S. Ct. 1194, 1196-1197 (1963).

CONCLUSION

It is respectfully submitted that sound reason exists for this court noting jurisdiction and granting the writ sought.

Respectfully submitted,

LEONARD FELDMAN,
Attorney for Petitioner.

SUPREME COURT, U. S.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Order Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 24th day of March, 1964.

Present—Hon. CHARLES D. BREITEL, *Justice Presiding*
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER, *Justices*

IN THE MATTER

OF

ARTHUR BENNETT, *An Attorney.*

The above named respondent, Arthur Bennett, having moved for leave to reargue this proceeding, or, in the alternative, for leave to appeal to the Court of Appeals from the order of disbarment of this Court, entered on January 30, 1964,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Arthur Bennett in support of said motion, and the affidavit of Henry Weiner in opposition thereto, and after hearing Mr. Leonard Feldman for the motion, and Mr. Henry Weiner opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied in all respects.

ENTER:

VINCENT A. MASSI
Clerk.

APPELLATE DIVISION OF THE SUPREME COURT,
FIRST JUDICIAL DEPARTMENT,
CLERK'S OFFICE, COUNTY OF NEW YORK

I, VINCENT A. MASSI, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy of order has been compared with the original thereof filed in this office on the 24th day of March, 1964, and that the same is a correct transcript thereof, and of the whole of the said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 24th day of March, 1964.

/s/ VINCENT A. MASSI
Clerk

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Decision

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT, SEPTEMBER 1963

CHARLES D. BREITEL, J. P.,
JAMES B. M. MCNALLY,
HAROLD A. STEVENS,
SAMUEL W. EAGER,
ARON STEUER, JJ.

Motions Nos. 2, 3 and 4

September 24, 1963

In the Matter

of

ARTHUR BENNETT, an Attorney.

Disciplinary proceedings instituted by the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association. Respondent was admitted to the Bar on January 21, 1942, at a Term of the Appellate Division of the Supreme Court in the Second Judicial Department.

Henry Weiner, attorney for petitioners.

Leonard Feldman, attorney for respondent.

PER CURIAM

Respondent, 43, was admitted to practice at a term of the Appellate Division, Second Department, in January, 1942, and has been actively engaged therein except for a period of four years in the military service.

The petition alleges nine charges of professional misconduct; one was withdrawn (Charge 7). The remaining charges are as follows:

Charge 1. Knowingly submitting false loss of time and earning figures to insurance carriers.

Charge 2. Conspiring to submit false personal injury claims to an insurance carrier.

Charge 3. Knowingly submitting false medical reports.

Charge 4. Making payments of compensation or gratuities to an employee of an insurance carrier to corruptly influence the adjustment of personal injury claims of persons represented by respondent, either as attorney or as counsel to another attorney.

Charge 5. Knowingly submitting false bills of particulars of injuries and special damages.

Charge 6. Settling claims of infants without procuring court orders approving such compromises and fixing legal fees.

Charge 8. Using the name of another attorney, with his permission, as attorney for claimants and parties in actions, whereas, in fact, such other attorney had not been so retained, in order to conceal the true name of the attorney for such persons; knowingly submitting false loss of earning statements to an insurance carrier and paying a percentage of settlement to an employee of such

insurance carrier for the purpose of corruptly influencing him.

Charge 9. Failure to preserve pleadings and other papers for the period required by Rule IV-F of the Special Rules Regulating Conduct of attorneys of the Appellate Division, First Department (now Rule 4(6)).

As to Charge 1 the Referee sustained the specifications relating to Irving Blum and Martin Albin. The specifications relating to Alvin Denbaum, Sherman Ingraham (true name Ingram) and Alfred Silverstein were not sustained; other specifications were withdrawn. Charges 2, 6, 8 and 9 were sustained by the Referee. Charges 3, 4 and 5 were not sustained by the Referee.

We find ample support in the record for the specifications and charges sustained by the learned Referee and confirm his findings thereon. In addition, we hold that the evidence amply sustains the specification on the claim of Sherman Ingram in Charge 1.

In the Ingram matter the employer's questionnaire was forwarded to the insurance carrier on August 6, 1954 and thereafter returned with the information unquestionably false establishing five weeks' disability at $60 per week. The testimony is that respondent supplied the information contained in the questionnaire to Alvin Kaston who signed the questionnaire. Prior to August 6, 1954 respondent had furnished substantially the same information to the carrier's adjuster and medical examiner. In the circumstances we are of the opinion that the record establishes that respondent was the source of the information contained in the questionnaire.

The report of the Referee in the Sherman Ingram claim is disaffirmed and the specification sustained.

Charge 4, to the effect that respondent paid gratuities to an adjuster of an insurance carrier to induce preferential treatment in the settlement of claims for personal injuries, was not sustained by the Referee. The adjuster to whom the alleged payments were made was disbarred by reason of his receipt of similar payments. (*Matter of Benjamin,* 13 A D 2d 221.) The testimony is that in respect of 24 claims payments were made to the adjuster and on each occasion he delivered the drafts in settlement to respondent at his office and thereupon received in currency 5% of the amounts thereof. Respondent denied the payments; in addition, he testified that he did not personally meet the adjuster until the fall of 1958, long after the alleged payments upon which the charge is based.

Respondent denied that he represented the claimants Morasky and Hoffman. The Referee found and the documentary evidence establishes that respondent represented the said claimants. We conclude as did the Referee that respondent's testimony with regard thereto is untrue.

William B. Gladstone, a former attorney who was associated with respondent in some matters, testified he represented the claimant Pollack and had been unable to obtain a settlement of the claim; that he turned over the matter to respondent and within a short time it was adjusted for the sum of $2,500. The evidence also establishes that said adjustment was made between respondent and the adjuster Benjamin acting in behalf of the carrier. Benjamin by his own admission was guilty of professional misconduct.

The record establishes that respondent was extremely successful in the negotiation of settlements with Benjamin in matters of doubtful validity and that Benjamin was motivated by monetary reward in generously and promptly settling them.

The issue of Benjamin's credibility was strenuously litigated; Benjamin was subjected to a scathing and exhaustive cross-examination. We note, however, that no attempt was made to inquire into Benjamin's knowledge of respondent's office and its occupants and that respondent did not introduce evidence by his secretary or any other persons regularly in attendance at his office to the effect that Benjamin did not attend at respondent's office.

We conclude that the Referee's finding on Charge 4 should be disaffirmed and the said charge sustained.

We have examined the record in the light of the contention that the requirements of due process were not met. This is largely grounded on the allegation that testimony was adduced by promises of leniency made by the Assistant District Attorney who presented the matters involved to a New York County Grand Jury and who was trial counsel for petitioner in this proceeding. It is also asserted that false testimony was adduced in this proceeding to the knowledge of petitioner's trial counsel. A careful examination of the record establishes no factual basis for these contentions. The record demonstrates that the matter was fully, fairly and scrupulously presented.

The charges and specifications sustained establish flagrant professional misconduct warranting disbarment. (*Matter of Gladstone*, 16 A D 2d 512; *Matter of Shields*, 16 A D 2d 50; *Matter of Benjamin*, 13 A D 2d 221; *Matter of Shufer*, 12 A D 2d 208; *Matter of Weitz*, 11 A D 2d 76; *Matter of Wysell*, 10 A D 2d 199.)

The proof establishes beyond doubt a general pattern of professional misconduct which demonstrates respondent's unfitness to remain in practice as an attorney.

Respondent should be disbarred.

ALL CONCUR.

Remittitur

COURT OF APPEALS

State of New York, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of December in the year of our Lord one thousand nine hundred and sixty-four, before the Judges of said Court.

Witness:

The Hon. CHARLES S. DESMOND, Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk

Remittitur December 3, 1964

---

1. No. 287

In the Matter of

ARTHUR BENNETT, An Attorney,

Appellant,

against

COORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

BE IT REMEMBERED, that on the 23rd day of July, in the year of our Lord one thousand nine hundred and sixty-four, Arthur Bennett, An Attorney, the appellant—in this cause, came here unto the Court of Appeals, by Leonard Feldman, his attorney—, and filed in the said Court a

Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Coordinating Committee on Discipline, the respondent—in said cause, afterwards appeared in said Court of Appeals by Henry Weiner, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Leonard Feldman, of counsel for the appellant—, and by Mr. Henry Weiner, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced

according to law, and which record now remains in the said Appellate Divi ..., before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York

Court of Appeals, Clerk's Office
Albany, December 3, 1964

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

Notice of Appeal to Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter

of

ARTHUR BENNETT, An Attorney

SIRS:

PLEASE TAKE NOTICE that the Respondent above named, Arthur Bennett, hereby appeals to the Court of Appeals from the order of this Court dated January 30, 1964, disbarring the Respondent above named, and said Respondent hereby appeals as of right to the Court of Appeals from each and every part of said order and on the ground that in the proceeding leading to said order the said Respondent was deprived of due process of law and the equal protection of the laws as provided for by Amendment XIV of the United States Constitution, and was deprived of due process of law and the equal protection of the laws as provided by Article 1, Section 6, and Article

1, Section 11, of the Constitution of the State of New York.

Dated: New York, N. Y.
February 20, 1964

Yours, etc.,

LEONARD FELDMAN,
Attorney for Respondent,
Office & P. O. Address:
32 Broadway,
New York 4, N. Y.

To:

HON. VINCENT A. MASSI,
Clerk, Appellate Division,
First Department,
Madison Ave. & 25th St.,
New York, N. Y.

HENRY WEINER, Esq.
Counsel to Coordinating Committee,
100 Centre Street,
New York, N. Y.

Order on Remittitur from Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 22nd day of December, 1964

Present—Hon. BERNARD BOTEIN, *Presiding Justice*
" CHARLES D. BREITEL,
" BENJAMIN J. RABIN,
" FRANCIS L. VALENTE,
" JAMES B. M. MCNALLY,
Justices

In the Matter

of

ARTHUR BENNETT, an Attorney,

Appellant.

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

The above named appellant, Arthur Bennett, having appealed to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk of the said Court on the 30th day of January, 1964, disbarring the appellant from practice as an attorney and counselor-at-law in the State of New

York, and the said appeal having been heard in the Court of Appeals and after due deliberation the said Court of Appeals having ordered and adjudged that the order of this Court so appealed from be affirmed without costs, and that the record be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law;

Now, on reading the remittitur from the Court of Appeals of the State of New York dated December 3, 1964, it is

ORDERED that the order of the Court of Appeals of the State of New York be and the same hereby is made the order of this Court.

Enter

B B

.....

Presiding Justice

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 24 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 937

In the Matter of

ARTHUR BENNETT, an Attorney,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

ANGELO T. COMETA,
Attorney for Co-ordinating Committee on Discipline, Respondent.

DANIEL J. McMAHON,
On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 937

In the Matter of

ARTHUR BENNETT, an Attorney,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review an order of affirmance of the Court of Appeals of the State of New York made and entered December 3, 1964.

By order dated January 30, 1964, the Appellate Division, First Department, disbarred the petitioner. Thereafter *petitioner* moved for leave to reargue, or in the alternative, for leave to appeal to the Court of Appeals from the said order of disbarment. The Appellate Division denied petitioner's motion by order dated March 24, 1964, whereupon petitioner appealed to the Court of Appeals.

Respondents moved in the Court of Appeals to dismiss the petitioner's appeal, which motion was denied. Thereafter, the Court of Appeals heard petitioner's appeal and affirmed the order of the Appellate Division, without opinion. 14 N. Y. 2d 878.

POINT I

No evidence was suppressed and there was no denial of due process to petitioner.

The Issue Presented

The issue presented on this petition for a writ of certiorari is that trial counsel for respondent at the hearings before the Referee, withheld evidence and sat by while false evidence was adduced by respondent's witnesses on direct examination, giving rise to the claim of lack of due process.

The answer to this contention is that no evidence was withheld and no false evidence was adduced, and there was no lack of due process.

Assuming, *arguendo*, that there were any omissions or errors of fact in the direct testimony of respondent's witnesses, they were corrected on cross-examination by petitioner's experienced trial counsel, to whom respondent's trial counsel voluntarily made available every prior statement of respondent's witnesses from which statements any omissions or errors in recollection could be corrected.

The record submitted to the Referee, the Appellate Division and the Court of Appeals was correct and complete. There was no procedural flaw in the proceedings below and on the merits, the proof of serious professional misconduct

was ample to sustain the unanimous order of disbarment and its affirmance by the Court of Appeals. Petitioner was deprived of no constitutional rights.

The main thrust of petitioner's contention of lack of due process is an attack upon the conduct of respondent's trial counsel, Allen Harris, who tried the instant disciplinary proceeding with scrupulous fairness.

The Appellate Division disposed of petitioner's charge of lack of due process when it said in its opinion:

> "We have examined the record in the light of the contention that the requirements of due process were not met. This is largely grounded on the allegation that testimony was adduced by promises of leniency made by the Assistant District Attorney who presented the matters involved to a New York County Grand Jury and who was trial counsel for petitioner in this proceeding. It is also asserted that false testimony was adduced in this proceeding to the knowledge of petitioner's trial counsel. *A careful examination of the record establishes no factual basis for these contentions.* The record demonstrates that the matter was fully, fairly and scrupulously presented." *Matter of Bennett,* 20 A. D. 2d 218, 221 [Emphasis supplied].

The Facts Involved

Charge 2—The "Kaston" Case

Petitioner's theory that Kaston inculpated him as part of a "deal" with the District Attorney's office as a result of which Kaston would be permitted to plead to a misdemeanor, has no basis in fact. The truth is that when Kaston implicated petitioner in a fraudulent scheme, he disclosed no information of real value to the District Attor-

ney's office, which was looking for information, if any existed, that would supply the corroboration necessary under the Penal Law to support an indictment of petitioner or anyone else who might have been involved in the conspiracy to prosecute fraudulent accident claims (2738, 2739, 2748, 2768, 2769).* No such information was given by Kaston to the District Attorney's office (2767), and no indictment of petitioner or others resulted.

The reasons why Kaston was permitted to plead to a misdemeanor were that he had no prior criminal record, that he had made restitution, that he had finally taken the posture of cooperating with the District Attorney's office (albeit he supplied no information of value to the prosecutor, as indicated above), and that the acceptance of a lesser plea was conventional practice in this type of case (2743, 2744). The fact that Kaston had pleaded to a misdemeanor was brought out in the disciplinary proceeding by Mr. Harris on direct examination (567).

Petitioner did not call Kaston as a witness at the reopened hearings, even though he indicated that he intended to do so (2704); instead, petitioner resorts to innuendo in postulating a "deal" which never existed, and which petitioner knew he could not prove.

Charge 1—Irving Blum

Petitioner contends that Irving Blum may have been given an "inducement" to inculpate petitioner before the Referee by way of an understanding that if he did so, his mother, Clara Blum, would not be called to testify as a witness by respondent.

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* Parenthetic numerical references are to the transcript of testimony, unless otherwise noted.

This conclusion is not supported by the facts. Blum inculpated petitioner in his preliminary testimony before the Co-ordinating Committee; otherwise there would have been no specification as to Blum under this charge. Petitioner's statement (Pet. brief, p. 8) that Mr. Harris admitted, under oath, "that Blum had changed his story in the course of a pre-trial preparation session with Mr. Harris" and for the first time inculpated petitioner, is not the fact (2804); there was no substantial change by Blum except as to the matter of referral to the doctor and payment of the medical bill (38, 39, 2789); before the Committee, Blum said his recollection was that petitioner had not referred him to a doctor. Respondent made available to petitioner a copy of the transcript of Blum's testimony before the Committee (27), and there is, therefore, no excuse for petitioner's incorrect statement of fact in this area.

Clara Blum is an elderly lady in her late sixties (2799); she suffered a head injury; she had difficulty with transportation (2790); both Irving Blum and his wife requested that the elder Mrs. Blum not be called as a witness if not necessary (2790, 2791). The inferences which petitioner draws from these facts are unfounded.

Petitioner did not call the Blums as witnesses at the reopened hearings when he had ample opportunity to do so; instead of adducing their testimony in support of his allegations, petitioner resorts to innuendo to attempt to prove a "deal" to influence the testimony of the Blums, which he knows is non-existent.

Charge 1—Alvin Denbaum

The charge that petitioner submitted to an insurance company a false letter of loss of earnings in the course of

prosecuting a claim for personal injuries of his client, Alvin Denbaum, was not sustained by the Referee on the ground of insufficiency of proof (Report, 34).

Respondent accepted the Referee's finding, and did not move before the Appellate Division to disaffirm his report. Accordingly, the Denbaum specification was not litigated before the Appellate Division and played no part in the decision of the Court of Appeals to affirm the order of disbarment. Petitioner's statement that "it corroborates the pattern of suppression here involved" (Pet. brief, p. 8) is an unfounded inference that is totally irrelevant on its face.

Charge 4—Stanley Benjamin

Petitioner argues (Pet. brief, p. 10) that withholding of evidence permeated the Benjamin issue. To the contrary, Benjamin testified on more than one occasion, and respondent turned over to petitioner copies of the transcripts of Benjamin's testimony on other occasions, as follows:

1) Benjamin's testimony before the Grand Jury in the Kaston case;

2) Benjamin's testimony before the Co-ordinating Committee;

3) Benjamin's testimony before Referee Wasservogel in the Gladstone disciplinary proceeding;

4) Benjamin's testimony before Referee Wasservogel in the Greenberg disciplinary proceeding. (Upon completion of the trial Referee Wasservogel died before rendering his report and the case had to be retried);

5) Benjamin's testimony before Referee MacKinnon in the re-trial of the Greenberg disciplinary proceeding.

Petitioner had at his disposal, all of this voluminous testimony by Benjamin on other occasions, and in his effort to find inconsistencies and error, petitioner comes up with only one contention in his petition (Pet. brief, p. 10), and this is without foundation; petitioner here turns to the testimony of Mr. Harris in the Greenberg proceeding (Ex. D). First of all, Exhibit D was produced *voluntarily* by respondent, notwithstanding that at the time, the Greenberg proceeding was not finished; this is a sharply etched instance of co-operation, not of withholding evidence. From the aforementioned Exhibit D it appears that Mr. Harris, when an Assistant District Attorney, did *not* tell Mr. Benjamin that if he co-operated with the People he would not be indicted (1858, 1859). When Mr. Harris was asked if he conveyed the impression to Benjamin that if he co-operated he would not be disciplined by the Appellate Division, Mr. Harris answered (1859):

> "The only thing I told Mr. Benjamin, Mr. Feldman, was that I would bring it to the attention of the Appellate Division what co-operation he had given to the District Attorney's office, for whatever use the Appellate Division wanted to make of it."

Petitioner attempts to make capital of Mr. Harris' denial that he told Benjamin that petitioner had confessed to making payments to Benjamin. Benjamin was mistaken in his recollection on this point. If petitioner thought the point important enough, he had ample opportunity to develop it, if he wished to do so, by calling Benjamin as a

witness at the re-opened hearings before the Referee. But petitioner did not call Benjamin at the re-opened hearings. Petitioner refrained from calling Benjamin to the stand because he knew that once he pointed out to Benjamin this inconsistency between Benjamin's recollection and Mr. Harris' recollection Benjamin would admit that the recollection of Mr. Harris was more accurate than his. Here again, petitioner, absent proof, prefers to resort to innuendo, as he has throughout this entire proceeding.

The Appellate Division developed the Benjamin charge very carefully, as appears from its opinion under Charge 4. *Matter of Bennett, supra,* at p. 220.

Petitioner Was Treated With Fairness

Petitioner has attempted to create a sinister inference from the manner in which respondent conducts its preliminary inquiries, that is, *in camera* (Pet. brief, pp. 8, 9). Such inferences are gratuitous at best, and in an effort to dispel any doubts as to the purpose of the Committee and the procedure by which it operates, a historical note may be in order.

The supervision of the professional conduct of attorneys in the State of New York is imposed by statute upon the Appellate Division of the Supreme Court (subdivision 2 of § 90 of the Judiciary Law)

Because of widespread abuses prevalent in the prosecution of personal injury claims, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department made an order on February 3, 1959 authorizing and directing the Co-ordinating Committee on Discipline to conduct, under the personal supervision of

the Presiding Justice of the Appellate Division, a continuing investigation into the conduct of attorneys in the prosecution and defense of personal injury claims and of those employed by or associated with them.

Unlike the typical bar association investigation arising out of a specific complaint, this Committee does not generally operate on the basis of information supplied by an aggrieved complainant. As a result, its investigative procedures are surrounded by safeguards to protect the rights of attorneys being investigated (these safeguards are enumerated below).

Such an investigation as conducted by the Committee under the supervision of the Court is a non-adversary proceeding analogous to a Grand Jury proceeding, as was stated by the Court of Appeals of the State of New York in the landmark opinion of Chief Judge Cardozo in *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, and that analogy was reiterated by this Court in *Anonymous 6 and 7* v. *Baker*, 360 U. S. 287.

The procedures of respondent were eminently fair to petitioner:

1. Petitioner was given written notice by respondent of the institution of the preliminary investigation of his negligence practice prior to the interrogation of any witness.

2. The investigation was directed only to *closed* accident cases.

3. Petitioner was represented by counsel of his choice who was present when he was interrogated by respondent during the preliminary investigation.

4. Petitioner was permitted to obtain a copy of the transcript of his testimony given in the preliminary investigation.

5. Petitioner was served with detailed charges and specifications spelling out the professional misconduct charged and identifying the cases involved by name of claimant and date.

6. In response to his demand petitioner was given a Bill of Particulars consisting of 7 pages and 14 exhibits by respondent.

7. Petitioner was given an opportunity to examine the closed insurance company files in the cases which are specified in the petition.

The Law at Issue

The law applicable to the conduct of a disciplinary proceeding, the quantum of proof and the degree of discipline, is clearly stated in *Matter of Flannery,* 212 N. Y. 610, 611:

> "*Per Curiam.* The Appellate Division has found the appellant guilty of gross unprofessional conduct and has decreed his disbarment. On this record our power of review is limited to the consideration of the single question whether the finding of guilt has any evidence to sustain it. (*Matter of Goodman,* 199 N. Y. 143; *Matter of Robinson,* 209 N. Y. 354.) It is not for us, where the evidence is conflicting, to determine where lies the truth. It is not for us, where opposing inferences may be drawn, to determine which we shall accept and which reject. It is not for us to revise the measure of punishment which guilt, when adjudged, is to entail. In estab-

lishing the standard of conduct to which the bar must at its peril conform, the Appellate Division has a wide discretion, with which we have neither the wish nor the power to interfere. If the conduct condemned is not wholly blameless, the extent to which it shall be reprobated is not for our determination. We have no right to say, where any measure of blame attaches to the offense, that the standard has been set too high.

"In the light of these guiding principles we have considered this voluminous record, and have reached the conclusion that the evidence sustains the findings. It would serve no useful purpose to follow the course of the proofs and to point out the inferences to be drawn from them. The court below, where conflicting inferences may have been possible, has seen fit, after weighing the evidence, to draw those adverse to the appellant, and to the rectitude of his purposes and motives. Drawing these inferences it has held that his conduct falls short of the standard to which the members of an honorable profession must conform. The appellant would have us say that the conduct which the court below has thus condemned is wholly free from blame. We are asked in effect to serve notice on the bar that what was done by the appellant may with impunity and honor be done by others. We cannot give that word.

"The order of disbarment should be affirmed."

Petitioner attempts to circumvent the holding in *Flannery* which is controlling in the proceeding at bar, and tries in his petition to give a distorted and factually incorrect portrayal of the record below in order to bring himself under the umbrella of *People* v. *Savides*, 1 N. Y. 2d 554 (Pet. brief, p. 12). In that case the prosecutor did not inform the Court and the jury of an understanding that he had with a witness

to plead to a lesser crime. *Savides* is not applicable to the case at bar since there was no such understanding with any of the witnesses against petitioner. Another factor to be borne in mind is that a disciplinary proceeding against an attorney does not involve a jury which might possibly be misled by evidence which would not mislead a Referee. As the Court said in *Matter of Shufer*, 12 A. D. 2d 208, 213:

> "... However, because a disciplinary matter is heard before a legally trained referee without the use of a layman jury the same strict application to such common-law rules is not critical, albeit eminently desirable. The Referee, in this case a distinguished and especially able former Supreme Court Justice, and later the reviewing court are quite capable of selecting that which is admissible from that which is not and making certain that the proof in support of the charges meets the test of the common-law rules. Of course, it is much the better practice to keep the proceedings confined to evidence which may be properly utilized in determining the charges."

Petitioner (Pet. brief, p. 14) relies upon the case of *Brady* v. *State of Maryland*, 373 U. S. 83. *Brady* involved suppression by the prosecution of a confession of guilt made by one defendant, which was material to the guilt or punishment of a second defendant who was convicted of murder in the first degree. The Court held that the prosecutor's failure to disclose this exculpatory evidence deprived the defendant of due process. This decision has no relevancy to the facts in the instant case. A significant comment by the United States Supreme Court in *Brady* is as follows:

> "We usually walk on treacherous ground when we explore state law, for state courts, state agencies and state legislatures are its final expositors under our Federal system."

In *U. S. ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (C. C. A. 2), cited by petitioner, *ibid.*, the prosecutor failed to disclose to the court and to the defense that he knew that two witnesses who were present at the scene of a robbery positively stated that they had not seen the defendant there. The Circuit Court of Appeals held, after the defendant had been convicted in the State court, that this suppression of evidence was a violation of due process. This case has no relevancy to the instant application.

The other cases cited by petitioner (Pet. brief, pp. 11-14) are equally inapplicable here.

Petitioner's basic complaint is that his counsel adduced on cross-examination some evidence which he feels trial counsel for respondent should have adduced on direct examination. Petitioner glosses over the factor of prime importance, namely that respondent's trial counsel *voluntarily* made available to counsel for petitioner all of the material from which such evidence was adduced. Nothing was withheld and nothing was suppressed; and, as the Appellate Division said, there is no factual basis for petitioner's contention of lack of due process. To put it another way, the conclusion to be drawn from petitioner's argument is that he feels aggrieved because respondent's trial counsel did not try petitioner's case. This is a frivolous contention, particularly since petitioner was represented by experienced trial counsel who has participated in similar disciplinary proceedings. See *Matter of Golenbock*, 13 A. D. 2d 178; leave to appeal denied, 9 N. Y. 2d 971; *Matter of*

Lemkin, 17 A. D. 2d 550, leave to appeal denied 13 N. Y. 2d 724, cert. denied 375 U. S. 892; *Matter of Greenberg*, 19 A. D. 2d 375; *Matter of Shufer*, cited *supra*; *Matter of Anonymous No. 1* v. *Co-ordinating Committee*, cert. denied, May 18, 1964, 377 U. S. 933.

The Significance of the "Constitutional" Issue in Relation to Punishment

Petitioner speculates (Pet. brief, p. 15) as to how much better his position would be if somehow Charges 1, 2 and 4, where his professional conduct was found to be corrupt and venal, were erased from the record, and a lesser degree of discipline imposed based upon Charges 6, 8 and 9. It is futile to pursue this fantasy in the light of the amply sustained proof of petitioner's acts of professional misconduct under Charges 1, 2 and 4, which are just a hair's breadth away from the commission of felonies. *Matter of Flannery*, cited *supra*.

It avails petitioner nothing to assert a constitutional question which does not in fact exist, *Matter of Shufer*, 12 A. D. 2d 208; motion for leave to appeal denied, cross-motion to dismiss the appeal granted, and the appeal dismissed upon the ground that no substantial constitutional question is directly involved, 9 N. Y. 2d 611. A clear and persuasive demonstration of the existence of a constitutional question, as well as of its substantiality, are required (cf. *People* v. *Foote*, 273 N. Y. 629, cert. denied, 302 U. S. 760; *Fryberger* v. *Harris Co., Inc.*, 273 N. Y. 115, 291 N. Y. 556, appeal dismissed, no substantial constitutional question; *Matter of Grade Crossing*, 261 N. Y. 541; *Bonner* v. *Gorman*, 213 U. S. 86, 91). There is no factual basis in the record below to support petitioner's contentions of lack of due process, and this requirement of Title 28, United States Code, Section 1257, has not been met.

CONCLUSION

The petition for writ of certiorari should be denied.

March, 1965

Respectfully submitted,

ANGELO T. COMETA,
Attorney for Co-ordinating Committee on Discipline, Respondent.

DANIEL J. MCMAHON,
On the Brief.

Office-Supreme Court, U.S.
FILED
MAR 31 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 937

In the Matter of

ARTHUR BENNETT, an Attorney,

Petitioner

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

LEONARD FELDMAN
Attorney for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 937

In the Matter of

ARTHUR BENNETT, an Attorney,

Petitioner

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent

PETITIONER'S REPLY BRIEF

Respondents' answering brief makes it manifest that the constitutional issue here is clear and compelling.

The basic issue is can a trial be deemed valid if there is evidence that during the trial a fundamental and basic violation of due process occurred?

It need not be extensively argued that to give the meaningless, but to secret and withhold the substantial, is to give nothing.

This Court has spoken on the requirement that due process be observed in the proceedings relating to admission to the Bar. It is respectfully submitted that this Court should now speak on the requirement that due process must be observed in proceedings designed to disbar attorneys.[1]

[1] In the five counties which comprise New York City and in Nassau County, which adjoins the city, there are three permanent inquiries with permanent staffs engaged in continued investigations and disciplinary prosecutions of attorneys.

Respondents' brief attempts to becloud the real issue. The plain unadulterated facts are these:

(1) Kaston did not implicate the petitioner until *after* he had entered into an arrangement with respondents' trial counsel (the then assistant district attorney) which arrangement included respondents' trial counsel's consent to a lesser plea for Kaston.

(2) *Blum's* implication of the petitioner did not come until *after* there had been a discussion between Blum and respondents' trial counsel regarding the calling of Blum's mother as a witness for respondents. Blum's mother was not called. The change in testimony did not relate to some innocuous matter. It related to the specific charge in issue—the circumstances under which and the responsibility for the creation of a certain false letter.

(3) In *Denbaum* respondent's brief finds justification for their trial counsel's conduct in the fact that their trial counsel's failures to reveal that Denbaum did not implicate the petitioner until *after* he had made a deal in which he traded an accusation of petitioner for freedom from prosecution for himself, did not result in a conviction of the petitioner. The essence of respondents' argument is that a denial of due process is of no consequence unless it results in harm. Respondents' concept of civil rights is unique.

(4) In *Benjamin*, respondents' brief blandly concedes that Benjamin testified falsely in the presence of respondents' trial counsel and also concedes that respondents' trial counsel silently sat by, knowing that testimony to be false. The transaction involved in the false testimony was again a *deal*, a deal to inculpate the petitioner.

The "fairness" which respondents' brief claims to have afforded petitioner would, in the case at bar, be ludicrous if it were not so tragic. Petitioner's disbarment was obtained by appealing to the self-interest of accusing witnesses who were pointedly assured that respondents' interest was the petitioner and not them. When in instance after instance it is shown that witnesses did not make any accusation until they were led to believe that an accusation would result in immunity for the , then to speak of "fairness" is to indulge in fantasy. When in instance after instance it is shown that the prosecuting attorney has knowingly permitted principal witnesses to lie on the stand then "fairness" can't even be discussed.

The respondents' discusion of the "law" is as irrelevant to the issue before this Court as is the respondents' discussion of "fairness". To argue, as do respondents, that the standards of due process are less applicable to a non-jury trial than to a jury trial is to ignore the history written in the opinions of this Court. A violation of due process occurs when judges, not juries, err.

To say that respondents' trial counsel "voluntarily" disclosed the evidence of Kaston's, Benjamin's, Blum's and Denbaum's falsity is to engage in pure dissembly. Respondents' trial counsel made no such disclosure during the trial. He made his disclosure only after he was called to the stand, long after the trial, and cross-examined to establish that in fact a withholding had occurred.

A withholding of evidence occurred. It is respectfully submitted that such a withholding taints a trial and renders it void for such a withholding is inconsistent with the very concept of due process.

Respectfully submitted,

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